Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

ROBIN B. MURPHY,

Petitioner,

v.

UNIVERSITY OF CINCINNATI, MONTY HOPKINS, GERALD O'DELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MARC D. MEZIBOV
Counsel of Record
CHRISTIAN A. JENKINS
MEZIBOV & JENKINS L.L.P.
1726 YOUNG STREET
CINCINNATI, OH 45202
(513) 723-1600

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-97-276
(Weber, J.; Hogan, M. J.)

[Filed May 12, 1999]

Robin J. Murphy,	)
Plaintiff	)
	)
v.	)
	)
University of Cincinnati, et. al,	)
Defendants	)
	)

REPORT AND RECOMMENDATION

This matter is before the Court on the motion for summary judgment by defendants the University of Cincinnati (UC), Monty Hopkins, and Gerald O'Dell (Doc. 16), plaintiff Robin Murphy's memorandum in opposition (Doc. 18), and defendants' reply. (Doc. 19).

Plaintiff Robin Murphy brings this employment discrimination action against her former employer, the University of Cincinnati (UC), the Head Coach of Men's and Women's Swimming and Diving, Monty Hopkins, and the former UC Director of Athletics, Gerald O'Dell. Plaintiff claims that Hopkins discriminated against her on the basis of her sex, and that Hopkins and O'Dell eventually discharged her in retaliation for her complaints about the discriminatory treatment, in violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000e et. seq., 42 U.S.C. § 1983, and the Ohio Civil Rights Statute, Ohio Rev. Code § 4112 et seq. Specifically, plaintiff contends that Hopkins treated her less favorably than the Coach of UC's Diving team, Charlie Casuto, a similarly situated male who was also under Hopkins's supervision. Plaintiff also alleges that when she reported Hopkins's discriminatory treatment to the Ombudsman's Office at UC, she also met with O'Dell and reported Hopkins's conduct to him. Plaintiff claims that notwithstanding her complaints, O'Dell and Hopkins retaliated against her for reporting the discrimination by suspending her and then discharging her from employment less than a month after she reported the sex discrimination. Plaintiff seeks reinstatement or front pay, compensatory and punitive damages, as well as attorney's fees and costs.

Defendants move the Court for summary judgment as to all plaintiff's claims. Defendants contend that judgment is proper on plaintiff's claims against the individual defendants because: (1) neither Title VII nor Ohio Rev. Code § 4112 imposes individual liability on supervisors; (2) plaintiff's state law claims asserted against Hopkins and O'Dell are within the exclusive jurisdiction of the Ohio Court of Claims; therefore, this Court lacks jurisdiction over plaintiff's state law-claims; and (3) whether sued in their individual or official capacities, Hopkins and O'Dell are immune from suit under § 1983.

Defendants also contend that plaintiff's Title VII retaliation claim is barred for failure to-exhaust administrative remedies. Defendants argue that even if plaintiff's retaliation claim is not barred, she has failed to establish a prima facie retaliation case. As for plaintiff's discrimination claims, defendant argues that plaintiff cannot establish a prima facie sex discrimination case because she has failed to demonstrate that she was qualified for her position, subject to adverse action, or treated more favorably than a similarly situated male employee.

Predictably, plaintiff opposes the motion. First, plaintiff argues that the question of whether Title VII or Ohio law permits individual liability has not been resolved by the Supreme Court or the Ohio Supreme Court. Thus, plaintiff seeks to preserve her arguments on these issue for appeal. Second, plaintiff contends that while Hopkins and O'Dell may be entitled to immunity from a suit for money damages brought against them in their official capacities, plaintiff may obtain injunctive relief. Furthermore, according to plaintiff, these defendants are not entitled to qualified immunity on the claims against them in their individual capacities. Third, plaintiff argues that she has presented evidence sufficient to establish a prima facie case of both sex discrimination and retaliation, including evidence that she was subject to adverse action when Hopkins stripped her of all material coaching responsibilities, treated her less favorably than Casuto, and discharged her within a few weeks of registering discrimination complaints with UC's Ombudsman's Office. Plaintiff also claims that Hopkins discriminated in a similar manner against a former female assistant coach.

UNDISPUTED FACTS

Plaintiff Robin Murphy and defendant Monty Hopkins attended the same high school and swam for the same high school swimming coach. In the Summer of 1995, Hopkins was working as club manager of the Terrace Park, Ohio, Swim Club. Plaintiff was a member of the swim club after having recently moved with her family to Terrace Park. In July 1995, Hopkins informed plaintiff of an open position as Assistant Coach for Men and Women's Swimming with the University of Cincinnati, where Hopkins was the Head Coach. Plaintiff applied for the position and was hired to begin work on September 1, 1995, subject to a one year probationary period.

The parties agree that plaintiff and Murphy experienced problems in their working relationship almost immediately after plaintiff was hired. Plaintiff contends that Hopkins began treating her in "an objectionable manner" as soon as her first day of work. Defendant asserts that plaintiff failed to familiarize herself with the equipment and training manuals given to her by Hopkins when she was hired, and that within two weeks of starting her job she committed an NCAA rules violation. Hopkins and Murphy also had disagreements about the ratings of the swimmers, plaintiff's hotel accommodations at away meets, Hopkins's request that plaintiff drive the UC van and swim team members back from an away meet in Indiana, and a variety of other issues.

During the first week of November 1995, plaintiff met with Mitzie Cole of the University's Ombudsman's Office and complained about the treatment she was receiving from Hopkins. In addition to the issues mentioned above, plaintiff told Cole that Hopkins refused to introduce her to officials and coaches at away meets, did not keep her informed of

practice or workout schedule changes, did not accept her input about team lineups for meets, and told Cole that she felt she was being treated differently because she is a woman. Cole suggested that both plaintiff and Cole meet with O'Dell to discuss these issues. A meeting with O'Dell took place on November 6, 1995. Plaintiff related the same complaints discussed above to O'Dell. O'Dell told plaintiff he would look into her complaints and concerns.

Hopkins told O'Dell he found plaintiff to be inflexible and insubordinate for failing to adhere to his scheduling directives. With O'Dell's approval, plaintiff was placed on administrative leave on November 9, 1995, pending an investigation of her complaints. Hopkins simultaneously initiated the discharge process by completing an evaluation of plaintiff's performance dated November 7, 1995. On November 28, 1995, Hopkins and O'Dell met to discuss plaintiff's complaints, and O'Dell told Hopkins that plaintiff had complained to the Ombudsman's Office about sex discrimination. In early December, Cole initiated a meeting with Hopkins and Murphy to attempt to mediate their disputes. Hopkins, however, requested that O'Dell grant him permission to terminate the mediation process with Cole. On December 5, 1995, Hopkins met with Murphy to give her the November 7, 1995 written evaluation and to discuss an overview and summary of her perceived performance problems. Plaintiff responded to Hopkins's evaluation in writing on December 6, 1995. On December 8, 1995, with O'Dell's approval, plaintiff was terminated for insubordination. Plaintiff subsequently filed discrimination charges with the Ohio Civil Rights Commission (OCRC) on January 17, 1995.

DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD BE GRANTED IN PART

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex,* 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams,* 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgment motion. *McDonald v. Union Camp Corp.,* 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes v. Runyon,* 912 F. Supp. 280, 283 (S.D. Ohio 1995)(Spiegel, J.). "[A]fter a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting [one's own] earlier deposition

testimony." *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson,* 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes,* 912F. Supp. at 283. *See also Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson,* 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted. *Street,* 886 F.2d at 1478 (citing *Celotex* and *Anderson).* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Plaintiff's § 1983 Claims against the University and Hopkins and O'Dell in their official Capacities are Barred on Immunity Grounds

The Eleventh Amendment to the United States Constitution bars a suit in federal court against a state or one of its agencies in the absence of the state's express consent to be sued or the unequivocal abrogation of the state's immunity by Congress. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy,* 113 S. Ct. 684 (1993); *Pennhurst State School &*

Hospital v. Halderman, 465 U.S. 89, 99-100 (1984); *Edelman v. Jordan,* 415 U.S. 651 (1974). The Eleventh Amendment bar extends to actions where the state is not a named party, but where the action is essentially one for the recovery of money from the state. *Edelman,* 415 U.S. at 663; *Ford Motor Company v. Dept. of Treasury,* 323 U.S. 459, 464 (1945). A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued as well. *Pennhurst,* 465 U.S. at 99. Thus, the fact that the state has waived immunity from suit in its own courts is not a waiver of its Eleventh Amendment immunity from suit in the federal courts. *Id.*

Plaintiff asserts § 1983 claims against the University of Cincinnati, a state university and therefore and arm of the state, as well as two university employees in their official capacities. Plaintiff does not dispute that defendant UC is an arm of the state. *See Nimmo v. Southern State Community College Case* No. C-1-83-738, (S.D. Ohio Nov. 19, 1985)(Rubin, J.)(citing *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299, 304 (6th Cir. 1984)). Clearly, plaintiff's equal protection claims asserted under 42 U.S.C. § 1983 against UC and Hopkins and O'Dell in their official capacities are claims for damages against the State of Ohio. While plaintiff concedes that such claims are barred, she asserts that she may pursue injunctive relief under § 1983. However, a review of plaintiff's amended complaint makes clear that she has not made a prayer for injunctive relief. *(See* Doc. 10, amended complaint, p. 7). Accordingly, these claims are barred by the Eleventh Amendment and should be dismissed for lack of jurisdiction.

The Individual Defendants Are Not Entitled to Qualified Immunity on Plaintiff's § 1983 Claims

State government officials generally are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Black v. Parke,* 4 F.3d 442, 444 (6th Cir. 1993)(quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Qualified immunity insulates government officials from individual liability for money damages. *See, e.g., Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992).

A constitutional right is "clearly established," thereby precluding the application of qualified immunity, if "the law [is] clear in regard to the official's particular actions in the particular situation." *Black,* 4 F.3d at 445 (quoting *Long v. Norris,* 929 F.2d 1111, 1114 (6th Cir.), *cert. denied,* 112 S.Ct. 187 (1991)). *See also Mackey v. Dyke,* 29 F.3d 1086, 1094 (6th Cir. 1994). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The official, therefore, will be immune if a state official of reasonable competence could disagree on whether the conduct violated plaintiffs rights. *Caldwell v. Moore,* 968 F.2d 595, 599 (6th Cir. 1992)(quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

Once a defendant raises a qualified immunity defense, the plaintiff must satisfy a two pronged analysis: (1) the allegations must state a claim for violation of a clearly established law; and (2) the plaintiff must present evidence sufficient to create a genuine issue of material fact as to whether a defendant in fact committed the acts alleged.

Williams v. Pollard, 44 F.3d 433,434 (6th Cir. 1995), *cert. denied,* 116 S.Ct. 69 (1995); *Adams v. Metiva,* 31 F.3d 375, 386 (6th Cir. 1994); *Russo v. Cincinnati,* 953 F.2d 1036, 1043 (6th Cir. 1992).

In the present case, plaintiff alleges that Hopkins discriminated against her on the basis of her sex and that Hopkins and O'Dell discharged her in retaliation for having reported the discrimination to the University's Ombudsman's Office. Defendants cannot seriously contend that plaintiff's right to be free from sex discrimination and retaliation is not a clearly established right of which a reasonable person would have known. Certainly O'Dell cannot be held liable for Hopkins's alleged discriminatory conduct, including Hopkins's alleged disparate treatment of plaintiff. *See O'Brien v. City of Grand Rapids,* 23 F.3d 990, 1000 (6th Cir. 1994). However, to the extent that plaintiff claims both Hopkins and O'Dell retaliated against her following her complaints to Mitzie Cole and her meeting with O'Dell, O'Dell may be liable if he authorized, approved, or knowingly acquiesced in unlawful retaliatory conduct. *See Hays v. Jefferson County,* 668 F.2d 869, 874 (6th Cir. 1982). Thus, if questions of fact exist to preclude summary judgment on plaintiffs discrimination or retaliation claims, the individual defendants will not enjoy qualified immunity with respect to those claims.

The Court Lacks Jurisdiction Over Plaintiff's State Law Claims

Count Four of plaintiff's amended complaint alleges sex discrimination under Ohio Rev. Code § 4112 et. seq.[1] In

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[1] The Court acknowledges that if it did not lack jurisdiction over plaintiff's state law claims for the reasons discussed *infra,* plaintiff would be entitled to pursue claims against Hopkins and

order to determine whether the Court can exercise supplemental jurisdiction over this claim, the Court must look to Ohio's civil rights statute to determine whether defendants have waived immunity from suit in federal court. In the present case, the answer is clear. Discrimination claims against the state brought pursuant to Ohio Rev. Code § 4112 are within the exclusive jurisdiction of the Ohio Court of Claims. *See Harris v. Ohio Dept. of Admin. Services,* 577 N.E.2d 1180 (Ohio Ct. App. 1989); Ohio Rev. Code §§ 2743.02(F) & 3361.01. While Ohio's Court of Claims Act serves to waive the state's immunity from suit, the State has the right to determine where such suits may be brought. *Pennhurst,* 465 U.S. at 99. Ohio has vested the Court of Claims with exclusive jurisdiction to hear suits for money damages against the state and state actors. Ohio Rev. Code § 2743.02. *See Freidman v. Johnson,* 480 N.E.2d 82, 84 (Ohio 1985). The State of Ohio has not constitutionally nor statutorily waived its Eleventh Amendment immunity in the federal courts. *See Johns v. Supreme Court of Ohio,* 753 F.2d 524 (6th Cir. 1985), *cert. denied,* 474 U.S. 824 (1985); *State of Ohio v. Madeline Marie Nursing Homes,* 694 F.2d 449 (6th Cir. 1982). Thus, Ohio has not waived its immunity from such suits in a federal forum. In the present case, there are no allegations in the complaint that defendants Hopkins or O'Dell were acting outside the scope of their employment or in any capacity other than as employees of the University when plaintiff was allegedly discriminated against and terminated because of her sex. Thus, Count Four alleges nothing more than a claim for money damages against the state and state

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O'Dell based on individual supervisor liability under Ohio Rev. Code § 4112. *See Genaro v. Central Transport, Inc.,* 84 Ohio St. 3d 293, 703 N.E.2d 782 (1999).

actors. For the foregoing reasons, this Court lacks jurisdiction and Count Four should be dismissed.

By contrast, the Court does have federal question jurisdiction over plaintiff's federal sex discrimination claim. This claim is not subject to the limitations imposed by the Eleventh Amendment because Ohio's immunity from suit in federal court under this statute has been abrogated. Thus, plaintiff's Title VII claim will not be dismissed on Eleventh Amendment grounds.

Plaintiff Has Failed to Establish A Prima Facie Sex Discrimination Case

Plaintiff claims that Hopkins discriminated against her by stripping her of all material responsibilities as Assistant Swimming Coach and by treating her less favorably than Coach Casuto. Plaintiff claims that examples of Hopkins's discriminatory and disparate treatment leading up to her suspension and eventual discharge include: (1) being embarrassed, humiliated, and "treated like a nobody"; (2) being ordered off the pool deck and directed to stand in the hallway during swim practice; (3) having Hopkins change practice or workout schedules without consulting her; (4) being required to perform physical labor such as sanding and repainting equipment; (5) failing to introduce her to coaches or officials at swim meets; (6) instructing her to drive a UC van back to campus from an away meet without prior notice; (7) calling her "stupid"; (8) telling her that a swimmer was exhibiting improper form by "sticking her but up in the air again"; (9) telling her she was parking in his parking space; and (1) suggesting that she "better exercise" so she would not "get fat" like the last girl [i.e. the previous Assistant Coach]." According to plaintiff, these incidents are evidence of discrimination because Hopkins either did not or

would not have treated Casuto in a similar manner. Plaintiff also claims that Hopkins told her before she was hired that because of Title IX, he was being forced by O'Dell to hire a woman as Assistant Coach over male coaching candidates whom he preferred. Plaintiff also claims that Hopkins told her he could avoid having to hire a woman in the future by eliminating the Assistant Coach position.

Defendants contend that while plaintiff appeared qualified before she was hired, her performance did not meet Hopkins's legitimate expectations; therefore, she was not qualified for her position. Defendants also contend that plaintiff did not suffer any adverse action prior to her termination. Finally, defendants argue that plaintiff has failed to demonstrate that she was treated less favorably than similarly situated males because Coach Casuto is not a proper comparable.

Under Title VII, a plaintiff may establish a *prima facie* case of disparate treatment by showing either direct or indirect evidence of discrimination. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). A plaintiff alleging disparate treatment sex discrimination may establish a *prima facie* case through the following circumstantial evidence: (1) she is a member of the protected class; (2) she was performing her job satisfactorily; (3) she was subject to an adverse employment action; and, (4) she was replaced by someone outside the protected class. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994). However, the aforesaid test is not the only way to establish a *prima facie* discrimination case. *McDonnell Douglas,* 411 U.S. at 802. Plaintiff may also raise an inference of discrimination by presenting evidence that defendant treated her less favorably than similarly situated

male employees. *International Brotherhood of Teamsters v. U. S.*, 431 U.S. 324, 335-36 n. 15 (1977); *Mitchell,* 964 F.2d at 582-83. In other words, the plaintiff must show that sex was a determining factor in the adverse action the employer took against her. *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991). The employer is entitled to judgment if the plaintiff does not establish a *prima facie* case. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-84 (6th Cir. 1992).

In the present case, it is undisputed that plaintiff is a member of the protected class. The parties dispute whether plaintiff was qualified for her position, whether she was subject to adverse action, and whether she was treated less favorably than a similarly situated male. For the reasons set forth more fully below, the Court finds that plaintiff fails to establish the elements necessary to support a prima facie case of sex discrimination.

1. Qualified for the Position

Defendants assert that plaintiff was terminated for lack of flexibility in assuming work assignments and insubordination. In response to defendants' assertion that plaintiff was not meeting Hopkins's expectations, plaintiff argues that his expectations were neither legitimate nor reasonable. Plaintiff does not dispute that she failed to follow Hopkins's directives with respect to working with a swimmer; rather, plaintiff argues that Hopkins's request was unreasonable because she did not know when the swimmer would arrive and left only after waiting for him. Plaintiff also relies on her qualifications at the time she was hired and Hopkins's deposition testimony that she was the best candidate for the job in support of her claim that she was qualified for the Assistant Coach position.

In order to show that plaintiff was qualified, she must demonstrate that she was performing her job at a level which met her employer's legitimate expectations. *Ang v. Procter & Gamble Co.*, 92 F.2d 540, 548-49 (6th Cir. 1991)(quoting *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990)). If plaintiff fails to meet her employer's reasonable expectations, she cannot raise an issue of fact as to the quality of her work merely by challenging her supervisor's judgment. *Id.* The *Ang* Court found that the plaintiff's history of poor performance, when coupled with the diversion of his attention away from his job responsibilities to his discipline for violating company confidentiality, rendered him "not qualified." Similarly, the *McDonald* Court found the plaintiff was not qualified, where he acknowledged that his supervisors were dissatisfied with his performance at the time of his discharge. 898 F.2d at 1160. Title VII is not a vehicle for reviewing what plaintiff may deem to be a bad business decision or for questioning the soundness of her employer's judgment. *Id.* Thus, an employer may make a subjective decision to discharge an employee for any reason, so long as the decision is not based on discriminatory motive or intent. *Ackerman,* 670 F.2d at 70.

The evidence is undisputed that plaintiff disagreed with Hopkins on coaching decisions, committed an NCAA rules violation, challenged Hopkins's authority to make scheduling and workout plan changes without consulting her, complained about being asked to perform equipment maintenance and repair, objected to the time commitment required of her by Hopkins, and failed to familiarize herself with certain equipment within the time period expected by Hopkins. The evidence is also undisputed that Hopkins was dissatisfied with plaintiff's performance. Plaintiff cannot raise an issue of fact merely by challenging Hopkins's judgment and arguing that his expectations were unreasonable. *McDonald,* 898 F.2d at

1160. Plaintiff's subjective belief that Hopkins wanted her to work longer hours than her salary commanded or that she should have been part of the decision-making process with respect to workout, practice schedules, and swimmer rankings is merely an attempt to challenge defendant's business judgment. For these reasons, plaintiff has failed to demonstrate that she was performing satisfactorily at the time of her discharge and therefore has failed to demonstrate that she was qualified for her position.

2. Adverse Action

It can hardly be disputed that plaintiff's discharge was an adverse employment action. However, plaintiff claims that she was subjected to "other forms of material adverse job action" prior to her discharge. Plaintiff argues that she was embarrassed, humiliated, and treated "like a nobody" and that she "didn't have any job responsibilities as far as specific tasks." Plaintiff claims that defendant Hopkins did not allow her perform all the duties listed in the job description she obtained after she contacted the Ombudsman's Office; rather, she was assigned "nominal" duties, required to "stand idly" next to Hopkins during swim meets, and ordered off the pool deck at one point. According to plaintiff, this treatment significantly diminished her material responsibilities and constituted adverse employment action.

In order to show that she suffered an adverse employment action, plaintiff must demonstrate that Hopkins's actions about which she complains were a "materially adverse" change in the terms of her employment *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Generally, reassignments without salary or work hour changes do not ordinarily constitute adverse employments decisions. *Id.* (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.

1987)). To determine whether an employment action is adverse, the Court may consider factors such as whether plaintiff was subject to termination of employment, or a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation, *Id.* at 886. Moreover, a change in employment conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. *Id.* (referring with approval to *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). When pay and benefits remain the same, generally a change in job title or a "bruised ego" are not enough to support a claim of adverse action. *Id.* at 885-86. *See also Vannoy v. OCSEA Local 11*, — F. Supp.2d— , 1999 WL 101237, *4 (S.D. Ohio Feb. 23, 1999)(Marbley, J.).

In the instant case, plaintiff did not experience any loss of wages or any change in benefits during the course of her employment as the Assistant Coach for Men and Women's Swimming. Plaintiff was not transferred, demoted, nor was her job title changed. Rather, acting as her Supervisor and the Head Coach, Hopkins removed her from performance of certain duties during her probationary employment period because she was not performing them to his satisfaction. At most, plaintiff's allegations lead to the conclusion the Hopkins was somewhat gruff, dictatorial, or insensitive in his managerial style. However, plaintiff has failed to demonstrate that changes he made in her employment were anything more than a mere inconvenience or an alteration of job responsibilities. *Kocsis,* 97 F.3d at 886. Thus, plaintiff fails to demonstrate that she was subject to adverse employment action prior to her suspension and discharge.

3. Similarly Situated

In support of her sex discrimination claim, plaintiff alleges that she was treated less favorably than Coach Casuto. According to plaintiff, she and Casuto are similarly situated because they are both Assistant Coaches, supervised by Hopkins. Plaintiff asserts that Casuto is permitted to set his own practice and workout schedule, drive his own car to away meets, and manage his diving team members. Plaintiff also claims that Casuto was not required to perform equipment maintenance or attend team meetings.

Where plaintiff seeks to establish a prima facie sex discrimination claim based on the assertion that she was treated differently than similarly situated male employees, plaintiff bears the burden of proof with respect to the issue of comparability. *Creech v. Ohio Casualty Insurance Co.,* 944 F. Supp. 1347, 1354 (S.D. Ohio 1996)(Beckwith, J.). In order to establish that the person with whom plaintiff seeks to compare herself is similarly situated, plaintiff must demonstrate that the she and the comparable employee are similarly situated "in all relevant aspects." *Pierce v. Commonwealth Life Ins. Co.,* 40 F.3d 796, 802 (6th Cir. 1994). In cases involving allegations of discriminatory discipline resulting in termination, the Court may consider factors such as whether plaintiff and the alleged comparable dealt with the same supervisor, were subject to the same standards, and engaged in substantially comparable conduct. *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir. 1998)(citing *Mitchell,* 964 F.2d at 582). A plaintiff is subject to the same standards of performance and discipline as the proposed similarly situated employee where the plaintiff and the comparable employee have sufficiently similar duties and responsibilities. *Noland v. Lorain Board of Education,* 869 F. Supp. 529, 531 (N.D. Ohio 1994), *affd,* 70

F.3d 115 (6th Cir. 1995). However, these are not the only factors which a court should consider in determining whether a non-protected employee is similarly situated; rather, the Court must make an independent determination as to the relevancy of a particular aspect of plaintiff's employment status and that of the comparable. *Ercegovich,* 154 F.3d at 352. As the Court explained in *Mitchell,* the individuals with whom plaintiff seeks to compare herself must be similarly situated, "without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." 964 F.2d at 583.

It is undisputed that Casuto did not receive a copy of his job description until after plaintiff reported her allegations of discrimination to the Ombudsman's Office. While plaintiff claims that according to the written description her job and Mr. Casuto's jobs were on par, that assertion is belied by the evidence. Casuto has been coaching diving for over thirty years, and has been coaching at UC for over twenty years, while plaintiff had no collegiate coaching experience at the time she was hired by UC. The evidence is undisputed that Hopkins was not involved in any day-to-day' coaching responsibilities for the diving team and did not control Casuto's work or practice schedule, coaching, or recruiting efforts. The evidence is also undisputed that Casuto has driven team members to away meets in the University van and regularly performs physical labor as part of routine diving team equipment maintenance. As defendant noted, plaintiff's recitation of the facts in support of her claim that Casuto was treated more favorably supports this Court's finding that Casuto and plaintiff are not proper comparables. Moreover, even if they were similarly situated, there is no evidence that Casuto challenged Hopkins's authority to set workout and practice times for the swimmers or refused to perform any task assigned by Hopkins. Therefore, plaintiff and Casuto

were neither subject to the same standards nor did they engage in comparable conduct.

For the foregoing reasons, the Court finds that plaintiff was not qualified for her position, subject to adverse action, or treated more favorably than a similarly situated male employee. Because plaintiff cannot establish a prima facie case with respect to her Title VII sex discrimination claims, summary judgment should be granted in defendants' favor on this claim.

Plaintiff's Title VII Retaliation Claim is Not Barred for Failure to Exhaust Administrative Remedies

Defendants argue that plaintiffs Title VII retaliation claim should be barred for failure to exhaust administrative remedies. Defendants assert that plaintiffs OCRC charge fails to allege retaliation. Defendants further contend that plaintiffs retaliation claim is not reasonably expected to grow out of her charge alleging disparate treatment sex discrimination. Plaintiff claims that she filed her initial charge pro se and that the OCRC did not advise her of her rights with respect to Title VII's retaliation provisions. However, plaintiff specifically raised the issue of retaliation in letters that she sent to the OCRC on February 22, and April 29, 1996. In addition, plaintiff expressly raised the issue of retaliation with the OCRC when she appealed the Commission's finding of no probable cause by letters dated August 14 and 19, 1996. Plaintiff argues that her retaliation claim should not be barred because it was clearly raised in the administrative proceedings below. Defendants counter that plaintiffs April 29, 1996 letter is inadmissible because there is no stamp indicating that is was ever received by the OCRC and it was neither produced by the OCRC in response to defendants' FOIA request, nor listed in the privilege log as a document in plaintiff's file

withheld from production. Defendants contend that because plaintiff failed to properly raise a retaliation claim, they were unable to participate in any conciliation process with respect to such a claim and therefore the claim should be barred.

In order for the Court to have jurisdiction over plaintiff's Title VII claims, plaintiff must first pursue administrative relief. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 545 (6th Cir. 1991); *Cameron v. Bd. of Educ. of the Hillsboro, Ohio, City School Dist.*, 795 F. Supp. 228, 234 (S.D. Ohio 1991)(Spiegel. J.). While the timely filing of a charge with the OCRC or EEOC is not itself a jurisdictional prerequisite, if a claimant does not first present her claim to the OCRC or EEOC, she may not bring that claim in federal court. *Ang*, 932 F.2d at 545. The purpose behind this rule is to trigger the investigatory and conciliatory procedures and enable the Commission to attempt to obtain voluntary compliance with the law. *Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998). However, in this Circuit, the charge filing requirement has been expanded so that the judicial complaint is limited to "the scope of the [administrative] investigation reasonably expected to grow out of the charge of discrimination.'" *Id.* (internal quotations omitted). *See also Ang*, 932 F.2d at 545; *Cameron*, 795 F. Supp. at 234. One reason for expanding the filing requirement is because charges are frequently filed by lay complainants. *Davis*, 157 F.3d at 463. The courts recognize that subsequent judicial actions should not be restricted by the lay person's failure to attach the correct legal conclusion to the charge or failure to include the exact wording which might be required in a judicial proceeding. *Id.* Therefore, when the EEOC or OCRC investigation of a charge in fact reveals that there is evidence of a different type of discrimination, a lawsuit based on the newly understood claim will not be barred for failure to exhaust administrative remedies. *Id.* (citing *Sanchez v.*

Standard Brands, Inc., 431F.2d 455,466(5th Cir. 1970)). Likewise, where facts related with respect to the charged claim would prompt the Commission to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on such a claim, *Id.*

In the present case, the Court finds that plaintiff should not be precluded from bringing suit on her retaliation claim. The Court agrees with defendants that the OCRC charge filed on January 17, 1996, does not include a claim of retaliatory discharge. However, plaintiff received at least two letters dated January 23, 1996, from Will E. Johnson, the OCRC investigator assigned to her case, in which Johnson directed her to inform him of "any new information that would be beneficial in resolving the issues." (Doc. 19, Canton Aff., Exs. E & F). In response, plaintiff wrote Johnson a letter discussing the facts of her case and stating:

> One fact that I would also like to point out is that because [the former Assistant Coach] did not complain to anyone and took the treatment she was subjected to, she was able to keep her job for an extended period of time. On the other hand, I sought assistance from the proper arbitration channels, and was consequently fired.

(Doc. 18, Murphy Aff., Ex. B)(emphasis in original). This letter clearly contains factual allegations which should have alerted the OCRC investigator that there were facts related with respect to the charged claim which would prompt the Commission to investigate a different, uncharged claim, namely retaliatory discharge. *Davis,* 157 F.3d at 463. Thus, even if as defendants allege, they did not receive a copy of the April 29, 1996 letter until it was attached to plaintiff's memorandum in opposition to summary judgment, the

February 22, 1996 letter should have put the Commission and other interested parties on notice that plaintiff believed that she was terminated in retaliation for reporting sex discrimination to the Ombudsman's Office. Plaintiff filed her charge pro se and followed up with letters in response to Johnson's requests for additional information. Plaintiff continued to address the issue of retaliation even though the investigator did not. Plaintiff even raised the issue during her administrative appeal but the OCRC never squarely addressed it. The fact that the Commission failed to investigate plaintiff's allegations of retaliation, which were brought forward after she filed a pro se charge but before the charge was subject to fact finding, should not bar her from pursuing a judicial complaint based on her alleged retaliatory discharge. Consequently, the Court must determine whether plaintiff has stated a prima facie retaliation claim.

Summary Judgment Should be Denied as to Plaintiffs Title VII Retaliation Claim

To sustain a retaliation claim, proof of discriminatory motive is crucial. *Rowe v. Cleveland Pneumatic Co., Numerical Control Inc.*, 690 F.2d 88, 92 (6th Cir. 1982). In order establish a retaliation claim, plaintiff must prove that: (1) she engaged in protected activity; (2) defendant knew that plaintiff engaged in such activity; (3) plaintiff suffered an adverse employment action; and (4) a causal connection exists between plaintiff's protected activity and the adverse employment action taken by defendant. *E.E.O.C.v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990), *cert. denied,* 498 U.S. 984 (1990); *Polk v. Yellow Freight System,* 876 F.2d 527(6th Cir. 1989). A plaintiff may demonstrate the requisite causal connection by demonstrating disparate treatment, or by showing that defendant's adverse

action closely followed plaintiff's protected activity. *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir. 1986), *cert. denied,* 478 U.S. 1006 (1986); *Wrenn v. Gould,* 808 F.2d 493, 501 (6th Cir. 1987). Assuming plaintiff establishes a prima facie discrimination case, defendants must articulate a legitimate nondiscriminatory reason for the adverse action taken. If defendants meet their burden, plaintiff's claim will be dismissed on summary judgment unless she can show that defendants' articulated reason for their actions is merely pretext for unlawful retaliatory conduct.

In the present case, it is undisputed that plaintiff registered a complaint with the Ombudsman's Office concerning the treatment she was receiving from Hopkins. It is also undisputed that Mitzie Cole from the Ombudsman's Office attempted to facilitated a mediation session between Hopkins and plaintiff and that Hopkins requested to terminate the session after several hours. Furthermore, it is undisputed that plaintiff also met with O'Dell and expressed her concerns regarding Hopkins's treatment of her. O'Dell told plaintiff he would "look into" her complaints. While defendants argue that plaintiff never explicitly stated to either Cole or O'Dell that she was being subjected to *discriminatory* treatment, she claims that she did make such a complaint. There is at least an issue of fact as to whether plaintiff engaged in protected activity. Title VII's retaliation provisions do not require plaintiff to use any magic words when registering complaints of discrimination in order to come within the purview of the statute's protections. Moreover, Hopkins and O'Dell were both certainly aware that plaintiff had gone to the Ombudsman's Office. Finally, it is undisputed that plaintiff was subject to adverse action when she was discharged from her employment as an Assistant Swimming Coach. Approximately three weeks after plaintiff's complaints to the

Ombudsman's Office and her meeting with O'Dell, plaintiff was placed on administrative leave. Approximately one week later, without ever responding to plaintiff concerning her complaints, O'Dell approved Hopkins's recommendation that plaintiff be terminated. Thus, plaintiff has come forward with evidence sufficient to satisfy the prima facie elements of a retaliation claim.

Defendants assert that plaintiff was terminated for insubordination. While plaintiff admits that she failed to complete a task assigned by Hopkins, she argues that insubordination was not the real reason for her discharge. The Court finds that question of fact exist on the issue of pretext which preclude summary judgment. As set forth *supra,* plaintiff was not qualified for her position because she was not performing up to Hopkins's expectations. However, plaintiff was not terminated for poor performance. There is a question of fact as to whether insubordination was the real reason for her discharge when there is evidence that Hopkins did not want to hire a woman assistant, plaintiff only failed to carry out an assigned duty on one occasion, Hopkins terminated mediation with plaintiff and Cole, and Hopkins recommended that plaintiff be terminated only after she complained to the Ombudsman's Office and the Athletic Director. For these reasons, defendant's summary judgment motion should be denied as to plaintiff's Title VII retaliation claim. Because the Court recommends denying the motion with respect to plaintiff's Title VII retaliation claim, defendants' motion should also be denied with respect to plaintiff's retaliation claim asserted under § 1983 against defendants Hopkins and O'Dell in their individual capacities.

IT IS THEREFORE RECOMMENDED THAT:

Defendants' summary judgment motion (Doc. 16) be GRANTED IN PART and DENIED IN PART.

Date: May 11, 1999 /s/_____
Timothy S. Hogan
United States Magistrate Judge